United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7397

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P/S

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-7397

STECHER-TRAUNG-SCHMIDT CORPORATION,

Plaintiff-Appellee,

vs.

M. A. SELF, BEE CHEMICAL COMPANY, ROULSTON & COMPANY, INC., THOMAS ROULSTON, ARTHUR S. HECKER, and JOHN DOE,

Defendants,

M. A. SELF, BEE CHEMICAL COMPANY and ARTHUR S. HECKER,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York

BRIEF FOR APPELLANTS M. A. SELF, BEE CHEMICAL COMPANY AND ARTHUR S. HECKER

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STATUTES AND RULES

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BRIEF FOR APPELLANTS M. A. SELF, BEE CHEMICAL COMPANY AND ARTHUR S. HECKER

ISSUES PRESENTED

This case involves a preliminary injunction granted by the District Court against appellants arising from an alleged violation by appellants of Section 13(d) of the Securities Exchange Act of 1934.

This appeal presents the following issues:

1. Whether the District Court erred in finding that the appellants and the other defendants in this action conspired to act as a group within the meaning of Section 13(d) of the Securities Exchange Act of 1934.

2. Whether the plaintiff-appellee, by mere unsubstantiated allegations in its complaint, has made the clear showing of irreparable harm traditionally required to warrant the granting of a preliminary injunction.

STATEMENT OF THE CASE

Plaintiff filed its complaint on April 7, 1975. The complaint alleges that appellants and the other defendants in s action as a group conspired to take control of plaintiff, and that appellants and said other defendants failed to file the statements required by Section 13(d) of the Securities Exchange Act of 1934 (the "Act"). Plaintiff also alleges, without any factual specification and without any support by affidavit or otherwise, that if appellants and said other defendants are not enjoined, their failure to file will dislocate the normal operations of plaintiff, create uncertainty, severely affect the orderly market for plaintiff's stock, erode the alleged confidence of the financial community and customers of plaintiff, adversely affect the morale of plaintiff's employees and continue uninformed investment decisions. It should be recognized that these allegations have been commonly asserted as a familiar defensive tactic utilized by apprehensive incumbent management who feel their control is threatened.

The relief requested by plaintiff is that appellants and said other defendants be restrained for a period of three years from voting shares of plaintiff held by them; from soliciting proxies; from entering into future agreements

to obtain control of plaintiff; from purchasing, acquiring or otherwise aggregating additional shares of plaintiff; from using, obtaining or disclosing any list of plaintiff's shareholders; and from taking any other steps in furtherance of any plan or scheme to acquire control or management of plaintiff.

In addition, plaintiff requested that appellants and said other defendants file statements in compliance with Section 13(d) of the Act. In this connection, however, plaintiff has filed two attorney's affidavits attempting to restrict the record on appeal, the effect of which would have been to prevent this Court from knowing that appellants have filed such a statement.

Plaintiff obtained a Temporary Restraining Order on April 7, 1975 restraining appellants and said other defendants until April 14, 1975 to the same effect as the relief requested in its complaint as set forth above. The Temporary Restraining Order was thereafter continued for approximately two months until the District Court entered the Preliminary Injunction on June 17, 1975.

Appellants on April 14, 1975 filed an answer to plaintiff's complaint with supporting affidavits together with a counterclaim against plaintiff alleging that plaintiff's proxy material for its annual meeting on April 30, 1975 omitted to state material facts in violation of Section 14(a) of the Act. This counterclaim is not before the Court of Appeals.

Appellants, in addition, moved on April 14, 1975 to dissolve the Temporary Restraining Order.

On April 14, 1975, defendant Thomas H. Roulston submitted an affidavit in opposition to plaintiff's motion for a preliminary injunction.

On April 16, 1975, plaintiff filed a reply to appellants' counterclaim and, in addition, plaintiff counterclaimed to the effect that appellants had made a tender offer for plaintiff's stock prior to the filing of plaintiff's initial complaint. Plaintiff's counterclaim is not before the Court of Appeals.

On April 17, 1975, plaintiff filed an amended complaint, the effect of which was to consolidate plaintiff's complaint and counterclaim in one document.

Appellants, on April 18, 1975, filed a reply denying plaintiff's tender offer counterclaim.

On April 21, 1975, appellants moved to restrain the annual meeting of plaintiff to be held on April 30, 1975, which motion was denied by the District Court. The Temporary Restraining Order, however, was modified to permit appellants to vote at said meeting.

On June 17, 1975, the District Court entered an order and decision granting plaintiff's motion for a Preliminary Injunction restraining appellants and said other defendants to the same effect as requested in the complaint.

On June 26, 1975, appellants petitioned the District Court for reconsideration of its order, primarily based upon appellants' filing of a proper Schedule 13D and in light of the decision of the U.S. Supreme Court in *Rondeau* v. *Mosinee Paper Corp.*, ... U.S. ....., 45 L. Ed. 2d 12, 95 S. Ct. .... (June 17, 1975) entered the same day as the District Court's order, or, in the alternative, for a stay of the Preliminary Injunction. The District Court on July 17, 1975 denied appellants' petition.

On June 27, 1975, appellants filed notice of appeal from the order and decision of the District Court.

On August 21, 1975, plaintiff filed with the Court of Appeals a notice of motion and motion seeking to strike from the record on appeal matters occurring subsequent to the District Court's order and decision of June 17, 1975, particularly appellants' motion for reconsideration which included appellants' Schedule 13D. This Court of Appeals, on September 2, 1975, denied plaintiff's motion.

STATEMENT OF FACTS

Plaintiff's Pleadings

Appellants, in substance, are charged with failure to file timely a Schedule 13D statement under Section 13(d) of the Act. This charge arises not from the direct ownership by appellants of plaintiff's shares, which were never in an amount requiring such a filing, but because the broker through whom appellant Bee Chemical Company purchased shares of plaintiff also bought shares of plaintiff for another party. Appellants did not even know of the broker's other purchases or the identity of the other purchaser and these facts are not contradicted by plaintiff and, moreover, are supported by Roulston's affidavit.

The preliminary relief requested and granted by the District Court is not directed toward compelling the filing of a Schedule 13D statement, which appellants have in any event voluntarily filed, but rather imposes severe prohibitory sanctions on appellants' rights as a stockholder of plaintiff without regard to whether the allegedly required statement is ever filed.

Plaintiff is a printing company with its principal offices located in Rochester, New York. Appellant, Bee Chemical Company, is a company engaged in a similar business. The principal offices of Bee Chemical Company are located in Lansing, Illinois. Appellant M. A. Self ("Self")

is President and Chairman of the Board of Bee Chemical Company. Appellant Arthur S. Hecker ("Hecker") is Vice-Chairman of the Board of Bee Chemical Company.

Appellants' Affidavits

a. Appellants' dealings with Roulston.

The affidavits of Self and Hecker filed in this action state that on July 12, 1973, Hecker and Self met with defendant Thomas Roulston ("Roulston"), President of Roulston & Company, Inc., to indicate to Roulston Bee Chemical Company's interest in seeking a suitable merger. After further study, plaintiff was identified to Roulston as a possible merger candidate.

In early September 1973, Roulston was advised of Bee Chemical Company's interest in taking a limited position in plaintiff's shares. Thereafter, during the period September 11, 1973 to January 28, 1974, Bee Chemical Company placed orders with Roulston to purchase up to an aggregate of 39,000 shares (representing no more than 4.85%) of plaintiff. Appellants have made no other purchases of plaintiff's shares. The shares purchased by Bee Chemical Company were held in street name until August 13, 1974.

Other than the foregoing discussions with Roulston, appellants never discussed with Roulston or anyone else any plan, understanding or arrangement to acquire, hold, vote or pool any shares of plaintiff. In addition, appellants did not know Roulston had purchased additional shares of plaintiff until some time after such other purchases had been made, and even then appellants were, and still are, unaware of the identity of the other purchaser.

b. Appellants' dealings with plaintiff concerning a merger.

Appellants had no discussions with plaintiff until April 2, 1974, on which date appellants, Roulston and representatives of plaintiff met to discuss a merger between the two companies. At this meeting certain descriptive documents concerning Bee Chemical Company, including extensive financial information, were presented to plaintiff's representatives. Plaintiff's representatives at that time took the merger matter under consideration and were generally receptive to the merger proposal.

With regard to plaintiff's annual meeting held on April 17, 1974, Bee Chemical Company voted the 39,000 shares beneficially owned by it in favor of plaintiff's management proposals. Appellants had no discussion with Roulston or anyone else with regard to the voting of any other shares of plaintiff.

On April 18, 1974, two of plaintiff's directors met with appellants in Lansing, Illinois, and inspected Bee Chemical Company's facilities and discussed the merger proposal. On April 23, 1974, plaintiff's President met with appellants in Lansing, Illinois, and inspected Bee Chemical Company's facilities and discussed the merger proposal. Subsequently, on May 22, 1974, plaintiff's President visited the facilities of Bee Chemical Company in Union City and Fairfield, New Jersey. Plaintiff's personal inspection of appellants' facilities further supplemented the information provided plaintiff.

During the consideration of the merger proposal by plaintiff, Roulston requested that its representation of Bee Chemical Company be defined. Pursuant to letters dated April 19, 1974 and May 2, 1974, Roulston was

retained to develop merger or acquisition possibilities, not limited to plaintiff, for Bee Chemical Company.

On July 17, 1974, plaintiff rejected the merger proposal.

c. Appellants' dealings with plaintiff after termination of the merger negotiations.

On September 17, 1974, Self met with representatives and directors of plaintiff. At this meeting, Self indicated that the purpose of his visit was not to renew merger discussions but to express his concern on behalf of Bee Chemical Company as the holder of 39,000 shares of plaintiff, over the low return on equity of the company. Self did not suggest liquidation of plaintiff, but indicated that liquidation as a hypothetical example would be more advantageous than plaintiff's continued low return. Self indicated that there was serious concern over the directions management was pursuing, particularly its new investment in expensive equipment for plaintiff's custom printing operations which would necessitate a continuation of low margins and low profits. In this regard, Self expressed justifiable criticism of plaintiff's management and directors.

At this meeting Self also requested that he be named a director of plaintiff, noting that Bee Chemical Company held more shares of plaintiff than all of the directors combined and that he could bring to plaintiff his background in printing and related technologies.

On October 17, 1974, at the request of plaintiff's President, appellants Self and Hecker met with plaintiff's President and another of plaintiff's directors. At this meeting, plaintiff's President indicated that plaintiff's Board had rejected Self's request to be named a director. Self reit-

erated his concern with the direction plaintiff was pursuing, but made no statement that appellants were considering any aggressive action.

On November 15, 1974, Self and Hecker met an outside director of plaintiff, William Warren, to indicate Bee Chemical Company's interest in acquiring in a private sale additional shares of plaintiff. In this conversation and in a further conversation in January, 1975 inquiry was made by Warren concerning Bee Chemical Company's interest in selling its shares. Although no definitive counteroffer was made by Warren, appellants did not discourage the possibility of selling Bee Chemical Company's interest.

On March 27, 1975, appellants met with representatives of plaintiff to discuss a cash acquisition of plaintiff by Bee Chemical Company. On March 31, 1975, Self was informed by plaintiff's President that plaintiff's Board had come to no conclusion regarding said cash acquisition. On April 4, 1975, plaintiff's President informed Self that plaintiff's Board was disinclined to enter into any negotiations with Bee Chemical Company. Construing plaintiff's President's statement as an invitation to suggest a specific price, Self then stated that Bee Chemical Company was prepared to make an offer to all plaintiff's shareholders at $8.00 per share if, and only if, management would cooperate with Bee Chemical Company, and subject to the approval of at least 66⅔% of the plaintiff's shareholders.

On April 7, 1975, plaintiff filed this action.

Following the District Court's order on June 26, 1975, appellants filed with the Securities and Exchange Commission and sent by registered mail to plaintiff a Schedule 13D statement.

Roulston's Affidavit

The affidavit of Roulston in this action states that Roulston & Company, Inc. is a general securities brokerage firm and that a large portion of its clients are institutional investors. The firm does not now own any shares of plaintiff. The firm suggested plaintiff as an investment opportunity to other institutional investors, one of which requested the firm to purchase plaintiff's shares. Such other investor acquired its shares of plaintiff after Bee Chemical Company's purchases without any knowledge of Bee Chemical Company or its ownership of plaintiff's shares. Beneficial ownership of shares held in Roulston's name resided either in Bee Chemical Company or the other investor, neither of which ever owned more than 5% of plaintiff's outstanding shares. Roulston denies any agreement to act in concert with Bee Chemical Company to acquire or vote shares of plaintiff.

Plaintiff's Affidavits

Certain of plaintiff's representatives and directors have filed affidavits which are substantially consistent with the foregoing facts, although there is some discrepancy regarding dates of certain meetings and plaintiff's characterization of such meetings. Such differences in substance are an attempt by plaintiff to infer from the facts some invidious or bad motive on the part of appellants. Motive is irrelevant in any event in a Section 13(d) case which deals with the filing of a statement. Appellants objectives, however, were proper and properly pursued and fully disclosed to plaintiff in open, negotiated business discussions.

ARGUMENT

I.

THE DISTRICT COURT ERRONEOUSLY FOUND THAT APPELLANTS AND THE OTHER DEFENDANTS IN THIS ACTION CONSPIRED TO ACT AS A "GROUP" WITHIN THE MEANING OF SECTION 13(d) OF THE SECURITIES EXCHANGE ACT OF 1934.

Section 13(d) (known commonly as the Williams Act) of the Securities Exchange Act of 1934 (the "Act"), provides, in pertinent part, as follows:

> "(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any [registered] equity security . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall within ten days after such acquisition send to the issuer at its principal executive office . . . and file with the Commission, a statement [Schedule 13D].
>
> . . .
>
> "(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for purposes of this subsection."

(a) Appellants did not act in concert with Roulston to acquire shares of plaintiff.

It is unquestioned that appellants at no time beneficially owned more than 4.85% of plaintiff's outstanding shares. Plaintiff's assertion, rather, is that appellants, Roulston and/or Roulston's customer constitute one "person" with-

in the meaning of the above definition, and that appellants' shares, when combined with shares Roulston purchased for another of its customers, constitute more than 5% of plaintiff's outstanding shares. (Plaintiff claims the aggregate amount after such combination is 7.95%.)

Plaintiff must show, therefore, that appellants and the other defendants acted as a group for the purpose of acquiring, holding or disposing of plaintiff's shares.

In order for defendants to be deemed a "group,"

> "Two criteria must be met: (1) The members must agree to act together for the purpose of acquiring, holding, or disposing of securities; and (2) once the members agree to act, they must own beneficially or acquire beneficially in excess of 5% of a class of equity security. *Mere relationship, among persons or entities whether family, personal or business, is insufficient to create a group which is deemed to be a statutory person.* There must be an agreement to act in concert. *GAF Corporation* v. *Milstein,* [453 F. 2d 709 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972)]." (Emphasis added.)

Texasgulf, Inc. v. *Canada Development Corp.* (1973 Binder) CCH Fed. Sec. L. Rep. ¶94,160 (S.D. Tex. 1973) at 94,683.

The facts are that appellants entered into an agreement with Roulston to the effect that Roulston would represent Bee Chemical Company in merger negotiations with plaintiff, for which Roulston would be paid a fee. There is no evidence that Roulston agreed to act in concert with appellants to acquire, hold or dispose of any shares of plaintiff, other than those purchased directly by Bee Chemical Company through Roulston as a broker in open market transactions.

Since appellants never acted in concert with Roulston regarding Roulston's purchases for its other customer, the primary question is whether appellants' business relationship with a merger broker or finder constitutes a conspiratorial acquisition of shares of the merger candidate which is intended to be covered by Section 13(d).

The discussions with plaintiff in 1974 concerned only a merger of the two companies. In order for such a merger to be consummated, not only would shareholders of plaintiff be required to vote at a meeting of shareholders called for that purpose, but a prospectus filed with the Securities and Exchange Commission pursuant to Rule 145 under the Securities Act of 1933, as amended, would also have been required to be submitted to all plaintiff's shareholders at least 20 days prior to such meeting. This procedure contemplates reasoned and unhurried action by plaintiff's stockholders.

With the safeguards provided in the registration process, there is no public interest served by applying the Williams Act to merger transactions of the kind described herein. In such transactions, the shareholders of the merger companies will have the complete information of a prospectus without any likelihood of pressure toward uninformed or ill-considered decisions. Cf. e.g. *Nachman Corp.* v. *Halfred, Inc.*, [1973-1974 Binder] CCH Fed. Sec. L.R. ¶94-455 (N.D. Ill. 1973). For this reason, an agreement among parties related solely to the acquisition of shares in a merger does not constitute a conspiracy covered by the Williams Act prohibitions. There was no other plan, agreement or arrangement between appellants and Roulston.

A recent decision of this Court (*Corenco Corporation* v. *Schiavone & Sons, Inc.*, 488 F. 2d 207 (2d Cir. 1973))

involved facts similar to those in the present matter and such facts were held insufficient to characterize the Schiavone and Rubin defendants therein as a group in violation of Section 13(d).

The facts in *Corenco* were that in 1972 Corenco Corporation ("Corenco") engaged a finder, Reed Rubin ("Rubin"), for a fee to find an acquisition company for Corenco. Rubin arranged a meeting between Corenco representatives and a representative of the Schiavone companies ("Schiavone"). No concrete proposal or plan emerged from the first meeting and thereafter discussions periodically took place until terminated on April 12, 1973.

In the meantime, during the first half of 1973, Schiavone purchased through Rubin 4.8% of Corenco's outstanding shares. During this period Rubin himself purchased an aggregate of 4.996% of Corenco's outstanding shares for various trusts and other advised accounts toward which Rubin occupied a special relationship. Rubin did not advise Schiavone of his purchases. Thereafter a formal tender offer was made by Schiavone for Corenco stock and the litigation ensued.

Corenco attempted to show that Schiavone and Rubin ". . . were a 'group' within the meaning of §13(d)(3) of the Exchange Act, and were required to file a Schedule 13D statement by reason of their purchases and holding of Corenco shares prior to July 3, 1973." 488 F.2d at 217.

The Court held Corenco to the language of its complaint (which is similar to the language in plaintiff's complaint) in requiring it to show that defendants Schiavone and Rubin "conspired" to acquire Corenco stock. Since Corenco failed to show any agreement between

Schiavone and Rubin, the Court held that no such "group" existed, even though Schiavone held 4.8% and Rubin 4.996% of Corenco's outstanding shares, meetings were held between the parties, Rubin was to receive a finder's fee if Corenco acquired Schiavone, and Schiavone purchased its shares of Corenco through Rubin.

> "These percentages indicate an acute awareness on the part of both parties of the 5% figure fixed by §13(d). However, absent an agreement between them a 'group' would not exist." 488 F.2d at 217.

Plaintiff herein has similarly charged appellants with a conspiracy to take control of plaintiff (Paragraph 35 of the Complaint). The *Corenco* case, as does the *Texasgulf, Inc.* case *supra,* makes clear that plaintiff must show more than that various combinations of its shareholders together owned more than 5% of its outstanding stock. Plaintiff must show a conspiracy among the parties to combine to acquire (other than by a registered offering) shares of plaintiff, or to pool their votes. All plaintiff can show is a business relationship as broker and finder between appellants and Roulston.

Finally, the *Corenco* case makes clear that the business relationship by which one defendant purchased his shares through the other broker defendant, does not create the inference sufficient to establish a conspiracy between them. The fact that Bee Chemical purchased 4.85% in plaintiff through Roulston, therefore, without showing some overriding concerted agreement beyond the finder's agreement, is insufficient to indicate a conspiracy.

(b) Roulston did not beneficially own the shares held by its other investor.

As stated in *Stirling* v. *Chemical Bank*, [1974-1975 Binder] CCH Fed. Sec. L.R. ¶94,810 (S.D.N.Y. 1974) at 94,810: ". . . voting control of stock had been held to be the only relevant element of 'beneficial ownership' within the meaning of Section 13(d)(1)."

The affidavit of Roulston explicitly and unequivocally denies any voting control or beneficial ownership over any of plaintiff's shares. The District Court in the circumstances made inferences from certain assumptions by plaintiff, none of which have any factual support, such as that Roulston was an investment adviser to its other customer, that Roulston had discretion as to purchases by such other investor and that plaintiff's stock was such a lemon that no one would recommend its purchase without hidden motives. The mere fact of record ownership in Roulston's street name is such a common occurrence that one can hardly infer beneficial ownership from this fact alone. And the fact that Roulston confirmed odd lot purchases by Bee Chemical Company as a market maker also does not imply beneficial ownership in Roulston of any other shares. In fact, plaintiff's Exhibit to the Affidavit of Charles L. Thompson indicates clearly that Roulston purchased the Bee Chemical Company and the other investor's shares from other parties, instead of from its own inventory, as the title market maker might suggest.

It was error, therefore, for the District Court to conclude on the basis of the record before it that Roulston was the beneficial owner of its other customer's shares of plaintiff.

II.

PLAINTIFF HAS NOT, BY MERE UNSUBSTANTIATED ALLEGATIONS IN ITS COMPLAINT, MADE THE CLEAR SHOWING OF IRREPARABLE HARM TRADITIONALLY REQUIRED TO WARRANT THE GRANTING OF A PRELIMINARY INJUNCTION.

On the same date (June 17, 1975) as the District Court's decision and order was issued, the U.S. Supreme Court rendered its decision in *Rondeau* v. *Mosinee Paper Corp.*, ... U.S. ....., 45 L. Ed. 2d 12, 95 S. Ct. ..... (June 17, 1975). The issue before the Supreme Court was whether a technical violation of Section 13(d) ". . . supports the grant of injunctive relief, a remedy whose basis 'in federal courts has always been irreparable harm and inadequacy of legal remedies.' *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 506-507, 3 L.Ed. 2d 988, 79 S. Ct. 948 (1959)." 45 L. Ed. 2d at 20.

The Supreme Court found that a proper Schedule 13D had been filed by Rondeau and that there was no suggestion that he will fail to comply with the Act in the future, nor had Rondeau attempted to obtain control of the company although he had stated that this was his objective. The Court stated:

> "On this record there is no likelihood that respondent's shareholders will be disadvantaged should petitioner make a tender offer, or that respondent will be unable to adequately place its case before them should a contest for control develop. Thus, the usual basis for injunctive relief, 'that there exists some cognizable danger of recurrent violation,' is not present here. *United States* v. *W.T. Grant Co.,* 345 U.S. 629, 633, 97 L. Ed. 1303, 73 S. Ct. 894 (1953). See also, *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U.S. 65, 72, 46 L. Ed. 808, 22 S. Ct. 585 (1902)." 45 L. Ed. 2d at 21.

The Supreme Court held that traditional equitable principles of irreparable harm continue to be necessary to justify entry of an injunction for a violation of the Williams Act and reversed the Court of Appeals conclusion that the "bare fact that petitioner violated the Williams Act justified entry of an injunction against him." 45 L. Ed. 2d at 22. For this principle the Supreme Court cited *Hecht Co.* v. *Bowles,* 321 U.S. 321, 88 L. Ed. 754, 64 S. Ct. 587 (1944) and particularly the holding of the *Hecht* case that the injunctive remedy has historically been designed to deter, not to punish.

In response to Mosinee Paper Corp.'s argument that as a matter of public interest it was in the best position to insure compliance with the Act, the Supreme Court stated that, although Mosinee's right of action is implied as consistent with the protection of investors, cf. *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964),

> ". . . it by no means follows that the plaintiff in such an action is relieved of the burden of establishing the traditional prerequisites of relief. Indeed, our cases hold that quite the contrary is true." 45 L. Ed. 2d at 23.

Citing *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282, 85 L. Ed. 189, 61 S. Ct. 229 (1940) and particularly *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 24 L. Ed. 2d 593, 90 S. Ct. 616 (1970), the Supreme Court held ". . . liability and relief are separate in private actions under the Securities Laws, and that the latter is to be determined according to traditional principles." 45 L. Ed. 2d at 24.

The Supreme Court in *Rondeau* v. *Mosinee Paper Corp.,* ..... U.S. ....., 45 L. Ed. 2d 12, 95 S. Ct. .....

(June 17, 1975), held that a technical violation of the filing requirements of Section 13(d) of the Act is insufficient to clearly show irreparable harm. Therefore, it must be determined whether it is clear that plaintiff herein, under traditional principles, will suffer irreparable harm due to appellants' alleged violation of Section 13(d).

Even were appellants members of a "group" for purposes of Section 13(d) and required to file a Schedule 13D, there is no continuing violation. In response to the District Court's order that appellants were part of such a group, although disagreeing with and appealing from that order, appellants voluntarily filed a Schedule 13D regarding Bee Chemical Company's ownership of plaintiff's shares. There is, therefore, no likelihood that appellants will not continue to file reports. Moreover, as is evidenced by the exhibits to plaintiff's complaint, considerable information of the nature called for by Schedule 13D concerning Bee Chemical Company was provided to plaintiff as early as April 1974.

Additionally, appellants' alleged violation of Section 13(d) is not even the obvious violation as in *Rondeau* v. *Mosinee Paper Corp.*, ... U.S. ....., 45 L. Ed. 2d 12, 95 S. Ct. ..... (June 17, 1975) where an admitted purchase by one party of more than 5% was made. The complex conspiracy theory of plaintiff's complaint should bear upon the justification of imposing severe penalties upon businessmen who feel they have conspired with no one. This is particularly true in light of the purpose of injunctive relief, which is deterrent not punitive.

The vague and nebulous charges of harm in the complaint are hardly sufficient to sustain a Preliminary Injunction. Although plaintiff filed many affidavits in this

action, plaintiff has filed no affidavit supporting the irreparable harm claims in the complaint. The complaint certainly presents no clear showing of how appellants' alleged failure to file a Schedule 13D, when plaintiff already had substantial information concerning appellants, could cause the effects alleged in the complaint. The charges in substance come down to management's anxiety concerning its own interests. And as was determined in *Rondeau* v. *Mosinee Paper Corp.*, ... U.S. ....., 45 L. Ed. 2d 12, 95 S. Ct. ..... (June 17, 1975), anxiety falls far short of the irreparable harm necessary to support an injunction.

The District Court, therefore, erred in granting a Preliminary Injunction based upon plaintiff's unsupported and spurious allegations of irreparable harm.

CONCLUSION

Unsubstantiated allegations in a complaint do not constitute a clear showing of any matter. In order for a Preliminary Injunction to issue, plaintiff must make the required "clear showing" of both (a) probable success on the merits and (b) possible irreparable injury. *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247 2d Cir. 1973); *Gulf & Western Industries* v. *The Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2d Cir. 1969). It should be noted that the District Court found that there is only a likelihood, not a probability, that the plaintiff will succeed in this action. Appellants submit that the standard of a clear showing of probable success set forth in *Sonesta, supra*, requires something more than a likelihood of success.

Plaintiff has not demonstrated that on the merits it is probable it will succeed in its claim that appellants and others have entered into a conspiratorial agreement as alleged in its complaint. Moreover, since appellants have filed a proper Schedule 13D, and since plaintiff has made no clear showing of any injury (other than speculative and artificial conclusory allegations purportedly resulting from appellants' failure to file a Schedule 13D), under the holding of the Supreme Court in *Rondeau* v. *Mosinee Paper Corp.*, ... U.S. ...., 45 L. Ed. 2d 12, 95 S. Ct. ..... (June 17, 1975), plaintiff has not made the clear showing of possible irreparable injury required for a Preliminary Injunction to issue.

For the foregoing reasons the ruling of the District Court granting a Preliminary Injunction in favor of plaintiff and against appellants was incorrect and should be reversed, with instructions to dissolve the Preliminary Injunction and to provide for such further relief as this Court may deem appropriate.

Respectfully submitted,

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PROOF OF SERVICE

In the UNITED STATES COURT OF APPEALS
For the Second Circuit

..... Term, A. D. 197.....

No. 75-7397

STECHER-TRAUNG-SCHMIDT CORPORATION, Plaintiff-Appellee,
vs.
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Defendants,

M. A. SELF, BEE CHEMICAL COMPANY and ARTHUR S. HECKER,

Defendants-Appellants.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT

Michael A. Bergeron being on his oath first duly sworn, deposes and says at the direction of BAKER & McKENZIE
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attorneys for Appellants

he served two copies of the BRIEF

in the above entitled cause this 15th day of September 1975

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by FIRST CLASS MAIL
at Chicago, Illinois, charges prepaid, and addressed as above.

And further affiant sayeth not.

Michael A. Bergeron

Subscribed and sworn to before me this

15th day of September, 1975

Doris M. Magnuson

Notary Public.